Supreme Court, U.S.
FILED
APR 30 1997
OFFICE OF THE CLERK

No. 96-1206

In the Supreme Court of the United States

OCTOBER TERM, 1996

JIMMY D. MCGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

12 pp

QUESTION PRESENTED

Whether the court of appeals correctly determined that, as required by *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), the district court had submitted the materiality issue to the jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. *DiRico*, 78 F.3d 732 (1st Cir. 1996)	8
United States v. *Gaudin*, 115 S. Ct. 2310 (1995)	6, 8
United States v. *Wiles*, 102 F.3d 1043 (10th Cir. 1996), petition for cert. pending, No. 96-1430	8
Victor v. *Nebraska*, 511 U.S. 1 (1994)	7

Statutes and rule:

Internal Revenue Code (26 U.S.C.):	
§ 6050I	3, 4, 6
§ 6050I(f)(1)(B)	2, 4
§ 7206	2
§ 7206(1)	5
18 U.S.C. 371	2
18 U.S.C. 1001	6
18 U.S.C. 1956	2
Fed. R. Crim. P. 52(b)	6, 8

Miscellaneous:

Webster's Third International Dictionary (1981)	8

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1206

JIMMY D. MCGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. 18-64) is reported at 79 F.3d 1396. The opinion of the en banc court of appeals (Pet. App. 1-17) is reported at 99 F.3d 671.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 31, 1996. A petition for rehearing was denied on December 2, 1996 (Pet. App. 65). The petition for a writ of certiorari was filed on January 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of filing a false Internal Revenue Service Form 8300, in violation of 26 U.S.C. 6050I(f)(1)(B).[1] He was sentenced to 36 months' imprisonment and assessed a $50,000 fine. A divided panel of the court of appeals reversed. Pet. App. 18-64. On rehearing en banc, however, the court of appeals vacated the panel decision and affirmed petitioner's conviction. *Id.* at 1-17.

1. In 1992, the IRS received information that petitioner had failed to report large sums of cash he had received from his law practice.[2] As a result, the IRS targeted petitioner in a sting operation. Two undercover IRS agents, operating under the assumed names "Hector Flores" and "Hector Martinez," approached petitioner in his law office, told him that they were cocaine traffickers, and sought his help in recovering cash that they said the police had seized and in which they both claimed an interest. Pet. App. 20-21.

Petitioner suggested to "Flores" and "Martinez" that, to secure his services, they would have to pay

---

[1] He was acquitted on two counts of money laundering (18 U.S.C. 1956), one count of filing a false income tax return (26 U.S.C. 7206), and one count of conspiring to defraud the United States (18 U.S.C. 371).

[2] As the panel observed, "[t]he information generating the investigation was well-documented at trial. Several ex-clients testified that McGuire routinely required large cash payments in the tens of thousands of dollars and refused to give receipts. Other individuals offered testimony about large amounts of cash observed in McGuire's home and about large purchases made with cash." Pet. App. 20 n.2.

him a $20,000 retainer. Both men expressed concern, however, about having their names appear on the standard form—Form 8300—that the IRS requires for certain currency transactions in an amount exceeding $10,000. See generally 26 U.S.C. 6050I. The three men discussed different strategies for evading the Section 6050I filing requirement, such as structuring the transaction to permit payment partly in cash and partly by check. Pet. App. 21-22 & n.4. Petitioner ultimately recommended that Flores and Martinez bring in a third party who could hand petitioner the $20,000 retainer and who would not object to having his name appear on IRS Form 8300. Petitioner offered to set up a dummy file for that third party and to say, if anyone inquired, that petitioner was representing Flores and Martinez purely on a contingent-fee basis. *Id.* at 22.

The next day, Flores and Martinez arrived at petitioner's office with a third undercover IRS agent, who went by the name "David Bolivar." Flores told petitioner that he and Martinez had "thought about what you said yesterday" and that "[w]e'll just go ahead and give you the 20,000." Indicating Bolivar, Flores then told petitioner that "if you need to put somebody's name or something, you can put his name on it." Petitioner asked if Bolivar had the money, but Flores said, "I got it here." Petitioner told Flores to put the money away because "[i]t should not come from you" and, sounding exasperated, added that he was "gonna walk out of the room for just a second, okay?" As petitioner was leaving, Flores asked if he should "[j]ust give it to [Bolivar]." Petitioner responded by throwing up his hands and leaving the room. After he returned, Bolivar handed him $20,000 in cash. Pet. App. 22-23.

On February 7, petitioner prepared an IRS Form 8300 to report his receipt of the money. On Part I of the form, petitioner identified Bolivar, not Flores, as the "individual from whom cash was received." Petitioner wrote nothing on Part II, which seeks identification of the "person . . . on whose behalf this transaction was conducted." Pet. App. 23. Ten days later, petitioner filed an amended form. In Part I, he again falsely listed Bolivar as the payor, but, in Part II, he named Flores as the person on whose behalf Bolivar had paid the $20,000. Neither form listed Martinez, even though he had told petitioner that he had an interest in the "recovery" of the fictitious drug money. See *id.* at 21, 23.

2. At trial, the district court instructed the jury that, to convict petitioner on the Section 6050I charge,[3] it had to find, among other things, that he "knowingly and willfully caused or attempted to cause a trade or business to file a report required under this section [an 8300 form] that contained a *material omission or misstatement of fact*." Pet. App. 4 (emphasis added).[4] That charge (Instruction 36) was

---

[3] Section 6050I(f)(1)(B) provides that "[n]o person shall for the purpose of evading the return requirements of this section * * * cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact." The "trade or business" at issue here was petitioner's law practice.

[4] In full, the district court instructed:

> Count 4 of the indictment charges the defendant with a violation of 26 U.S.C. § 6050I(f)(1)(B). The statute provides in pertinent part that:
>
> No person shall for the purpose of evading the return requirement of this section—

in marked contrast to an earlier charge (Instruction 20) that the district court had given in connection with a separate and unrelated count under 26 U.S.C. 7206(1), which prohibits knowing and willful false statements on an income tax return. With respect to that count, on which petitioner was ultimately acquitted, the court instructed the jury that it "need

---

(B) cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact.

The essential elements that must be proved under that section are:

FIRST, that the defendant knew of a trade or business's duty to report currency transactions in excess of $10,000;

SECOND, that with such knowledge, the defendant knowingly and willfully caused or attempted to cause a trade or business to file a report required under this section [an 8300 form] that contained a material omission or misstatement of fact; and

THIRD, that the purpose of the material omission or misstatement of fact was to evade the transaction reporting requirement.

In this case the trade or business alleged in the indictment is the defendant's law practice. You may find the defendant guilty of violating § 6050I(f) whether or not the trade or business filed, or failed to file, a true and accurate 8300 form. In other words, if you find beyond a reasonable doubt that the defendant caused or attempted to cause a trade or business to file a return that contained a material omission or misstatement of fact, and that he did so for the purpose of evading the transaction report requirements, then you should find the defendant guilty as charged as to this count. If you do not so find, then you should find the defendant not guilty.

Pet. App. 3-4.

not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide." Pet. App. 3. The court did not similarly withhold the materiality issue from the jury on the Section 6050I count, however, and petitioner did not object that the court had done so. Pet. App. 28.

3. While petitioner's appeal was pending, this Court decided *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), which held that the materiality element in a false-statement prosecution under 18 U.S.C. 1001 must be submitted to the jury. A divided panel of the court of appeals followed *Gaudin* and reversed petitioner's conviction. All three judges on the panel agreed that the district court's materiality instruction was error under *Gaudin*. Judge DeMoss took the position that the "error" was reversible under the "plain error" standard of Rule 52(b) of the Federal Rules of Criminal Procedure. Pet. App. 25-37. Judge Wiener concurred in the result, but, because *Gaudin* superseded contrary Fifth Circuit precedent applicable at the time of trial, he would have reversed petitioner's conviction under harmless-error analysis rather than plain-error analysis. *Id.* at 42-60. Finally, Judge Smith dissented on the ground that Rule 52(b) did not permit relief because the "error" was not "plain" at the time of trial. *Id.* at 60-64. The panel unanimously rejected petitioner's other claims.

4. The court of appeals granted rehearing en banc on the *Gaudin* issue and reinstated petitioner's conviction. The majority held that the district court had in fact committed no error because it "did not withhold the element of materiality from the jury on the count on which [petitioner] was convicted." Pet.

App. 1. The court observed that, whereas "Instruction 20, pertaining to a count upon which [petitioner] was *acquitted*, incorrectly removed the issue of materiality from the jury[,] Instruction 36, * * * which specified the elements of the only count for which [petitioner] was convicted, did not do so." *Id.* at 2. Accordingly, the court affirmed petitioner's conviction.

Judge DeMoss, writing for himself and two other judges, dissented on the grounds that Instruction 36 improperly withheld the materiality element from the jury and, in any event, that it did not adequately define that element for the jury. Pet. App. 5-17. Judge Smith agreed with the dissent that the district court had committed error, but he would have affirmed petitioner's conviction on the ground that the error was harmless. *Id.* at 5 n.1.

ARGUMENT

1. Petitioner renews his contention (Pet. 6-9) that the district court committed reversible error by removing the materiality element from the jury's consideration. As the court of appeals observed (Pet. App. 1-2), however, the district court did in fact instruct the jury that "material[ity]" was an "essential element[]" of the offense charged in the count at issue here, see *id.* at 4, and it therefore committed no error with respect to that count. Moreover, there was no "reasonable likelihood," *Victor* v. *Nebraska*, 511 U.S. 1, 6 (1994), that the jury interpreted Instruction 20, which related only to a count charging petitioner with filing a false income tax return, as applicable to the count on which he was convicted, which charged him with the separate offense of filing a false currency transaction form. See 27 R. 1864-1865

(instructing jury to consider each count separately); Pet. App. 25 (panel opinion of Judge DeMoss) (acknowledging that Instruction 20 "was specific to a separate § 7206(1) violation involving conduct unrelated to the sting operation"). The court of appeals' factbound holding on this point was correct and warrants no further review.

Petitioner also contends that the district court erred in not providing the jury with an explicit definition of "materiality." But petitioner requested no such definition at trial, and he cites no case in which a court has held that the failure to provide such a definition is error, much less "plain error" that would justify a reversal even in the absence of a contemporaneous objection.[5] See generally Fed. R. Crim. P. 52(b). In any event, petitioner does not explain how he could have been prejudiced by the district court's failure to provide the legal definition to which he belatedly claims entitlement. Compare *Webster's Third International Dictionary* 1392 (1981) (defining "material" to mean having "real importance or great consequence") with *United States* v. *Gaudin*, 115 S. Ct. 2310, 2313 (1995) (defining "material[]" to mean "having a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed").

---

[5] Petitioner argues (Pet. 8-9) that the court of appeals' decision conflicts with *United States* v. *Wiles*, 102 F.3d 1043 (10th Cir. 1996), petition for cert. pending, No. 96-1430 (filed Mar. 10, 1997), and *United States* v. *DiRico*, 78 F.3d 732 (1st Cir. 1996). That is incorrect. In each of those cases, unlike this one, the court of appeals reversed a conviction for *Gaudin* error because the district court had completely withheld the materiality element from the jury's consideration.

2. Petitioner also suggests (Pet. 9) that the Court should hold this case pending disposition of *Johnson* v. *United States*, No. 96-203 (argued Feb. 25, 1997). That suggestion is without merit. The question in *Johnson* is whether, on the facts of that case, the district court's failure to submit the materiality element to the jury in a perjury trial constitutes reversible error. Because the court of appeals here affirmed petitioner's conviction on the ground that the district court had in fact submitted the materiality issue to the jury, *Johnson* has no bearing on this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

APRIL 1997